also by a wrong procedure and that the adjournment into open court in order to treat the application as a notice of motion did not remedy the situation nor save the proceedings from being a nullity.

It is easy to understand why Syarikat Asian Enterprises made the application by Originating Summons. They were not a party to the suit and had no leave to intervene. But the mistake made was to regard themselves as the applicants. They were entrusted by the Sheriff to undertake the work of discharging the cargoes and should therefore have looked to him for payment. They could not be the applicants. There was no necessity for their applying to court for payment. The proper applicant was the Sheriff who had been authorised by the court to cause the work to be carried out. He should be the person to apply for the authority to pay Syarikat Asian Enterprises and he should apply in the pending Admiralty suit. No necessity arose for any originating procedure.

Under Order 52 rule 1 Rules of the Supreme Court which reads:

"1. Where by these Rules any application is authorised to be made to the court or a judge, such application, if made to a judge in court, shall be made by motion."

it should have been by notice of motion, unless by the other provisions in the rules, it could have been made by summons-in-chambers. And clearly such an application did not fall within any of the other provisions.

The next question then is whether the Order of Court in the Originating Summons is a nullity, as contended by counsel for the appellants. With respect, we do not agree, despite the failure to comply with the rules. The failure, in our view, resulted neither in any miscarriage of justice nor in any adverse effect on the other parties, least of all the intervenors. The citing of the Sheriff as the respondent to the Originating Summons and his consent to the order must mean that had he been the applicant, the same order would have been made by the court. The order was served on all the parties and no party had at any time prior objected. Then, if they were not given the opportunity earlier, as perhaps they should have been, they were given an adjournment of the hearing of the summons-in-chambers on May 28 to enable them to check and verify the accounts. At the resumed hearing on June 14, the other parties indicated clearly that they had checked the accounts and found them in order. Counsel for the intervenors did not confirm; neither did he, however, deny that he or the solicitors had done so and had found nothing to query. In the circumstances, it seems to us that to set the parties back at square one and require them to adopt another procedure with the same result would be a purposeless exercise in formalism, where the proceedings are not a nullity.

Lastly, we come to the objection of the appellants to the summons-in-chambers. It is grounded on the same contention that it should have been by notice of motion. It has, in the circumstances, even less substance. Evidence in a summons-in-chambers or in a notice of motion is by affidavit. The parties were heard in open court as on a motion.

The appeal is dismissed.

In the circumstances of this case, we consider that the order as to costs shall be that each party bears its own costs.

Before leaving this appeal, we should, we think, refer to the dependence on the 1975 English Rules of the Supreme Court and in particular on Order 75 rule 22(5). English rules are however applicable only where our local rules do not provide; Order 72 rule 2 1957 Rules of the Supreme Court, and what this rule adopts is "the present procedure and practice in England." Our rules do provide, though scattered in the various orders. Reliance therefore on the 1975 English rules in this case is unjustified on two counts.

Appeal dismissed.

Solicitors: *Chang & Vello; Presgrave & Matthews; Allen & Gledhill; Chan Ban Eng & Co.*

ZAHARAH BTE HUSSIN & ANOR. v. GOVERNMENT OF MALAYSIA

[O.C.J. (Abdul Razak J.) November 9, 1976]

[Kota Bharu — Civil Suit No. 19 of 1974]

Government Proceedings — Emergency — Tort — Armed forces — Fatal accident — Emergency (Essential Powers) Ordinance, 1965, s. 5 — Government Proceedings Ordinance, 1967, s. 15.

This was an action for negligence against the Government of Malaysia for the act of their servants in an incident in which the deceased were shot by the Security Forces. The event took place on March 11, 1973 at about 2 a.m. The defendant admitted the shooting but denied negligence. They said they took precautions before they fired; they also said the deceased had no right to be at the place where they were found because it was a gazetted controlled area under the ISA. They also pleaded that they were justified in law to act in the way they did, driven by necessity and done in good faith during the period of the emergency. The action was therefore bad in law.

Held: (1) once the defendant had alerted the plaintiffs to a defence in law indicating the nature of the law that they would be relying upon but without specifying whether it was statutory or otherwise then it was sufficient if the Statement of Defence indicated that it was under the common law, if the common law was prescribed by statute. Under section 15 of the Government Proceedings Ordinance the common law power of the Crown in time of war or peace for the purpose of the defence of the realm was preserved so were the powers given by statute in respect thereof;

(2) under section 5 of the Emergency (Essential Powers) Ordinance, 1969 no action could be taken against, in this case the defence witness, DW(3) or the Government provided that he had acted in good faith and in a reasonable belief that the action was necessary for the purpose intended;

(3) in this case although there was no doubt that DW(3) might have been negligent in what he did he was certainly not acting in *mala fide* or could it be said that he had no reasonable belief that the action was necessary for the purpose intended. There was no evidence of malice or improper motive which prompted him to do what he did. In the circumstances the action should be dismissed with costs.

Cases referred to:-

(1) *Government of Malaysia* v. *Mahan Singh* [1975] 2 M.L.J. 165.

(2) *Maimunah* v. *Abu Bakar* [1964] M.L.J. 223.

CIVIL SUIT.

Datuk Wan Mustapha for the plaintiffs.

Mohamed Saari bin Yusoff for the defendant.

Abdul Razak J.: This is an action for negligence against the Government of Malaysia for the act of their servants arising from a fatal accident at Kg. Legeh in Tanah Merah District in which the deceased were shot by the Security Forces. The event was on March 11, 1973 at about 2 a.m. The defendant admits the shooting but denies negligence. They said they took precautions before they fired; they also said the deceased had no right to be at the place where they were found because it was a gazetted controlled area under the ISA. They also pleaded that they were justified in law to act in the way they did, driven by necessity and done in good faith during the period of the emergency. The action was therefore bad in law.

No evidence was adduced by the plaintiffs on the incident except that they said on that fatal night one of the deceased Megat Ariffin went to see the other deceased Raja Ibrahim to accompany him to look for a *bidan* because Megat Ariffin's wife was about to give birth. Megat Ariffin carried a shotgun and Raja Ibrahim a torch. They went out into the night and later they were found shot. For the defence, evidence was given to the effect that the Army had been directed to go into the area of the scene of the incident because they received information that the C.T. were seen. Fifteen of the army men went and the purpose of their operation so the defence alleged was to lay an ambush. They took along a Special Branch man. On their way, they saw a light which they found to be a torch and a human figure carrying arm. The figure was flashing the torch up and down. They challenged the person "Siapa Itu" three times and when there was no answer one of them fired at him. Later they found two persons were shot.

I am of the view that in the circumstances in which the shooting took place, the person who shot did not exercise such reasonable care as one would expect from a member of the Armed Forces. It was evident that the purpose of the army was not to lay an ambush but merely to investigate whether the C.T. were around. It was so stated in the defence. It must have been so, otherwise the purpose of the army bringing a Special Branch man with them was unexplainable. One would expect that they would have cautioned themselves that they were to ascertain the identity of the persons first before they acted to shoot. The area in which the C.T. were reported seen was a rubber land development scheme. It was a populated area. They would have to remind themselves that kampong people being what they were would go out of their homes after dark. The circumstances called for the exercise of extra care and vigilance. In the defence it was stated that the person who shot, DW(3) Tengku Yusof, saw two persons with a torch and a sub-machine gun. On being challenged, the deceased gave no reply and ran away. But in evidence DW(3) said he only saw *one* figure carrying a shotgun not a sub-machine gun. It was never said that the person ran after being challenged. In the defence it was sought to say that the person in the dark was a C.T. because he carried a machine gun but that in any event DW(3) was justified in shooting because the person ran after being asked to identify himself. Having failed to establish that the person ran on being challenged the defendant said they had the right to shoot because they had given the necessary challenge and P(2) the Standing Operations Procedure said they could shoot after 3 challenges. But that rule seems applicable only to a soldier on sentry duty and the army was not on sentry duty that night. But even so, the same Standing Procedure in P(2) at page (3) under the heading "Orders for Opening Fire" says that sentries may fire on their own but must first ensure that the person he sees is the enemy. Thus even if the defendant says the army was in an ambush a soldier could not fire unless he received the order from the Commander. It says in (b): "In ambush, fire is controlled by the Commander unless the enemy comes from an unexpected quarter in which case the man who sees the enemy or is nearest to the enemy will fire." The army was not ambushed so the first person who saw the light could not fire before the enemy did. In the circumstances, DW(3) could not shoot without orders from his Commander, Lieutenant Zeelan, DW(2). Another circumstance revealed their lack of care. According to DW(3), the torch light was kept flashing to the ground even after he had made the challenge and until he fired his shot. He said the army had no light with them that night because that was the accepted practice. But if the army said they did not use any light because that would have exposed their presence surely it would be reasonable to expect that the C.T. would do the same and therefore should have warned them that the person who carried the torch could possibly not be the C.T. But the deceased were not entirely blameless. In the first place they should not have been found where they were since it was under a curfew. They should also have identified themselves on being challenged. For their own negligence, I find the deceased 50% to be blamed.

But be that as it may, the defendant said that they have a fundamental defence in law. They say that the act was dictated by necessity, done in good faith during the period of the emergency. I think once the defendant have alerted the plaintiff to a defence in law indicating the nature of the law that they would be relying upon but without specifying whether it was statutory or otherwise then it was sufficient if the statement of defence indicates that it was under the common law, if the common law is prescribed by statute. Under section 15 of the Government Proceedings Ordinance the common law power of the Crown in time of war or peace for the purpose of the defence of the realm is preserved so are the powers given by statute in respect thereof. The statute relied upon was section 5 of the Emergency (Essential Powers) Ordinance, 1969 which says:

"No suit, prosecution or other legal proceedings shall lie in any court against any public officer either personally or in his official capacity for or on account of or in respect of any act ordered or done by him during the emergency period for the purpose of maintaining order or public security or of carrying into effect any regulation, order, rule, by-law, direction or notice made or issued under this Ordinance, and no

suit, prosecution or other legal proceeding shall lie in any court against any other person for or on account of or in respect of any act done or purporting to have been done by him under any regulation, order, rule, by-law, direction, notice or instruction of any public officer given for any such purpose as aforesaid:

Provided that the act of such officer or person was done in good faith and in a reasonable belief that it was necessary for the purpose intended to be served thereby."

It is clear that under this section no action could be taken against DW(3) or the Government provided that he had acted in good faith and in a reasonable belief that the action was necessary for the purpose intended. The source of this principle is the common law. *Halsbury's* Laws of England, 3rd Edition, Vol. 7 at page 260 says:

"The Crown has the same power as a private individual of taking all measures which are absolutely and immediately necessary for the purpose of dealing with an invasion or other emergency."

It seems a fact that the state of emergency created by the Proclamation in 1969 is still in force. As to the validity of the Proclamation, I need only refer to the case of *Government of Malaysia* v. *Mahan Singh.*[1]

There is no doubt in my view that although DW(3) may have been negligent in what he did, he was certainly not acting in *mala fide* or had no reasonable belief that the action was necessary for the purpose intended. There was no evidence of malice or improper motive which prompted him to do what he did. The deceased were shot because they did not answer to his challenge and consequently he must have imagined that they were the C.T. He might have been careless in what he did but he had acted in good faith and in the reasonable belief that it was necessary for him to act as he did and therefore he had acted within the law. I would, therefore, dismiss the action with costs.

If however I am found to be wrong on the law then I would award damages as follows. There is no evidence by PW(1) as to her husband's age. It seemed agreed by both parties that he was 45. She said he was a Land Scheme settler. He tapped rubber and earned $300 a month and gave her $150 per month. But then she said she did not know how much he earned. PW(2) also gave the same figure of her husband's income and also did not know how much her husband actually earned. But she agreed as a tapper he would get about $2-$3 per day.

At 45 defence counsel said life expectancy is about 13 years. I think this is reasonable considering that in *Kemp & Kemp* life expectancy is even higher. As for the 2nd deceased, counsel reckons the years purchase to be 15 years. This in my view, is fair bearing in mind that in *Maimunah* v. *Abu Bakar*[2] although the deceased was 31, the years purchase was 11 years. For the income I would consider it at $3 per day at the average income of $60 per month. For the 2nd deceased, I would award an income of $70 per month.

There is thus loss of income for the 1st plaintiff of $60 per month at 13 = $9,360. For the 2nd plaintiff there is a loss of income of $70. But the wife was remarried a month before the trial. She said her husband was unemployed. But the husband was not called. I would consider loss of income therefore from the date of incident to the date of trial i.e. for 3 years at $2,520. This would merge with the life expectation at the concentual figure of $3,000. There is no strict proof of the funeral expenses, but I would award nevertheless a sum of $100 each for the 1st and 2nd plaintiff.

There would therefore be general damages to the 1st plaintiff at 50% in the sum of $4,680 and special damages of $100 and costs. There would be general damages to the 2nd plaintiff at 50% in the sum of $1,500 and special damages of $100 and costs. There will be interest at 6% for general damages from the date of issue of writ until judgment.

Action dismissed.

Solicitors: *Wan Mustapha & Co.*

PUBLIC PROSECUTOR v. TAN THO KIM & ORS.

[O.Cr.J. (Abdul Razak J.) December 4, 1976]
[Kuala Trengganu — Miscellaneous Criminal Application No. 3 of 1976]

Criminal Law and Procedure — Filing of notice of appeal within time — Application for notes of evidence — Judgment and notes of evidence inextricably connected — Delivery of judgment without notes of evidence — Court's refusal to deliver notes of evidence — Lapse of period to file petition — Application for extension of period to file petition — Right of applicant to notes of evidence — Criminal Procedure Code (F.M.S. Cap. 6), s. 307(5).

Criminal Law and Procedure — Notes of evidence — Right of applicant to — Criminal Procedure Code (F.M.S. Cap. 6), s. 307(5).

The accused were charged for an offence under the Prevention of Corruption Act for which they were acquitted and discharged by the President, Sessions Court on July 16, 1976. The applicant then filed his notice of appeal on July 12, within the required time. Pursuant to section 307(5), Criminal Procedure Code, he applied for the notes of evidence. The grounds of judgment were delivered to him but without the notes of evidence. On the 21st, before the period for filing the petition lapsed, the applicant wrote to the court asking why the notes were not delivered. On the date on which the time for filing lapsed, the President, Sessions Court wrote to the applicant to say why the court chose not to comply with his request. He explained that there was no purpose in supplying the notes when they had already been supplied earlier during the course of the trial. The applicant then applied for an extension of time to file the notice of appeal.

Held: (1) one of the essential purposes if not requirement of an appeal is that the parties and counsel alike should be placed in a position as to be able to present their case as fully and effectively as possible. This object would naturally be defeated and hence justice denied if the presiding officer should seek to dismember part or parts of the usual record against the wish of the party concerned;

(2) the right of the applicant to ask for the notes of evidence is one of law. He has not by his conduct sought to waive it. Since therefore he had not lost his right and the notes were not made available to him since filing his notice, the time for filing his petition had not lapsed.

Case referred to:-

(1) *Chapman* v. *Michaelson* [1908] 2 Ch. D. 612.

CRIMINAL APPLICATION.

Edgar Joseph for the 1st respondent.

Lee Leng Guan for the 2nd respondent.

Porres P. Royan for the 3rd respondent.

Abdul Razak J.: This is an application for an